86-390

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULTIMEDIA, INC.,

Petitioner,

v.

CRAIG HAWKINS, by and through his Guardian ad Litem, Linda Hawkins,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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September 10, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

This case involves a lawsuit against the owner of a newspaper for the tort of invasion of privacy by virtue of public disclosure of allegedly private facts. The questions presented are:

1. In such an action, do the First and Fourteenth Amendments to the United States Constitution require that the trial judge determine in the first instance whether the publication was privileged because it involved a matter of public interest?

2. In such an action, do the First and Fourteenth Amendments to the United States Constitution require the plaintiff to prove the absence of public interest and a variant of "actual malice" and to do so by clear and convincing evidence?

3. In such an action, if the general subject of the publication admittedly deals with a matter of public interest, is there a privilege under the First and Fourteenth Amendments to the United States Constitution to identify a participant in a case history used to illustrate the general subject of the publication?

RULE 28.1 LIST

Multimedia Cablevision of Oak Lawn, Inc.

Multimedia Cablevision of Alsip, Inc.

Multimedia Cablevision of Batavia, Inc.

Multimedia Cablevision of Chicago Ridge, Inc.

Multimedia Cablevision of Evergreen Park, Inc.

Multimedia Cablevision of Harvey, Inc.

Multimedia Cablevision of Hometown, Inc.

Multimedia Cablevision of Lisle, Inc.

Multimedia Cablevision of Markham, Inc.

Multimedia Cablevision of Oak Forest, Inc.

Multimedia Cablevision of Phoenix, Inc.

Multimedia Cablevision of South Holland, Inc.

Multimedia Cablevision of Villa Park, Inc.

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No. ———

MULTIMEDIA, INC.,

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CRAIG HAWKINS, by and through his Guardian ad Litem, Linda Hawkins,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

The petitioner Multimedia, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of South Carolina, entered in the above-captioned proceeding on March 11, 1986.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at 288 S.C. 569, 344 S.E.2d 145. It is reprinted in the appendix hereto, *infra* at 1a.

The order of the trial court denying the petitioner's post-trial motions and entering judgment on the verdict has not been reported; it is reprinted in the appendix hereto, *infra* at 5a.

JURISDICTION

The South Carolina Supreme Court entered judgment on March 11, 1986, affirming the trial court's judgment on the verdict for the respondent. On May 13, 1986, the state supreme court denied the petitioner's timely petition for rehearing. *See infra* at 4a. On July 25, 1986, Chief Justice Burger signed an order extending the time for filing this petition for certiorari to and including September 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITIONAL PROVISIONS INVOLVED

U.S. Const. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

U.S. Const. amend. XIV, § 1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

STATEMENT OF THE CASE

This action arises from the petitioner's publication, through one of its newspapers, of an article concerning the medical and social problems resulting from pregnancies among unwed teenage mothers. As a "side-bar," or related article to a general article on the subject, the newspaper printed a story that focused on a local case history of an unwed teenage mother. The "side-bar" article identified the respondent as the father of the illegitimate child. *See infra* at 10a, 16a.

Claiming invasion of privacy by virtue of public disclosure of allegedly private facts, the respondent brought suit in South Carolina state court against the petitioner several months after the publication of the article. The truthfulness and accuracy of the published facts were

never controverted.[1] Nor was there ever any dispute that the general subject of pregancies among unwed teenage mothers was a matter of important public concern.[2] Nevertheless, the trial judge permitted the case to go to the jury, which returned a verdict for the respondent for $1,500 in actual damages and $25,000 in punitive damages. The trial judge entered judgment on the verdict, and the South Carolina Supreme Court affirmed that judgment.[3]

Throughout the litigation the petition contended that the United States Constitution required that the respondent prove both the absence of public interest and a type of actual malice appropriate to this variety of invasion of privacy lawsuit,[4] and to do so in each instance by clear

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[1] Falsity or inaccuracy is not an element of the tort of publication of private facts. In South Carolina, the tort is defined as the "publicizing of one's private affairs with which the public has no legitimate concern" and which is "of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence." *Meetze v. Associated Press*, 230 S.C. 330, 335, 338, 95 S.E.2d 606, 608, 610 (1956). The jury was correctly instructed as to the elements of the tort. *See* Transcript of Record 225. The definition of the tort under South Carolina law is essentially the same as that in the other states that have recognized the tort. *See* Restatement (Second) of Torts § 652D (1977). The tort is recognized in nearly every state. *See* Prosser, *Privacy*, 48 Calif. L. Rev. 383, 386-88 (1960).

[2] The jury was instructed that

> "it's conceded that the question of illegitimate children is of public interest. However, the plaintiff takes the position that the identification of the plaintiff[] is an unwarranted intrusion of [his] privacy because [he himself is] not of a public interest, and [his] having illegitimate children or being the father . . . of an illegitimate child is not of a public interest."

Transcript of Record 227.

[3] The respondent's mother also brought suit on similar grounds, and her case was tried with that of her son. The jury declined to award her any damages, however, and she did not appeal.

[4] There are four distinct invasion of privacy torts—intrusion upon the plaintiff's physical solitude or seclusion, placing the plaintiff in a

and convincing evidence.[5] The petitioner also asserted that the trial judge was constitutionally required to accord "special scrutiny" to these issues.[6] In moving for a directed verdict, the petitioner argued generally that the trial judge should hold as a matter of federal constitutional law that the publication concerned a matter of legitimate public interest and therefore was privileged;[7] the petitioner also argued that the respondent had not met his burden of proof with regard to actual malice.[8] The trial judge denied the petitioner's motion for a directed verdict without elaborating on his reasons for doing so. The petitioner presented the same arguments in its motion for judgment notwithstanding the verdict.[9] The trial judge denied this motion, ruling that the issue of public interest is a question of fact to be determined solely by the jury, that no proof of any variant of actual malice is necessary to establish the type of invasion of privacy alleged in this action, and that it was appropriate to send the case to the jury rather than rule as a matter of law that the publication was constitutionally privileged.[10]

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false light in the public eye, appropriation of the plaintiff's name or likeness for the defendant's benefit or advantage, and public disclosure of true facts about the plaintiff that are not of legitimate public interest. *See, e.g.*, Restatement (Second) of Torts § 652A (1977). The last such variety is the tort involved in the instant action. Because public interest rather than truth is the cornerstone to a successful defense to a lawsuit alleging that tort, the petitioner proffered a modified definition of the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See* Trial Brief of Defendant 9.

[5] *See* Trial Brief of Defendant 4-10.

[6] *See id.* at 10-11.

[7] *See* Transcript of Record 213-14.

[8] *See id.*

[9] *See* Memorandum in Support of Defendant's Trial Motions and in Opposition to Plaintiff Linda Hawkins' Trial Motion 1-2, 3.

[10] *See infra* at 5a-6a.

The petitioner raised the same issues (among others) on appeal.[11] The supreme court's opinion affirming the judgment of the trial court mirrored the reasoning of the latter in holding that the issue of public interest is solely for the jury to decide, that no form of actual malice need be shown to recover for this type of invasion of privacy, and that there was no error in sending the case to the jury.[12]

REASONS FOR GRANTING THE WRIT

The issues presented by this case are worthy of this Court's review for three reasons: (1) they have been left unresolved by this Court's decisions; (2) state courts and lower federal courts have reached conflicting results and developed conflicting standards as to the issues presented; and (3) resolution of the issues by this Court is necessary to provide guidance to the broadcasting and publishing media in reporting on matters of public concern.

I. The questions presented by this petition have been left unresolved by this Court's decisions.

The notion that a person may be held liable for publishing facts that are completely truthful and accurate, and that relate to a pressing social problem, is a startling idea.[13] This Court has frequently stated that truth is an

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[11] *See* Transcript of Record [as submitted to the state supreme court] 158 ("Exception II"), 160-61 ("Exception V," "Exception VI," and "Exception VII"); Brief of Appellant 16-27.

[12] *See infra* at 3a.

[13] It is especially startling in the present case. The effect of the decisions below is that young men who become involved in out-of-wedlock pregnancies will have legal advantages not available to young women in the same situation. All the world knows of the young woman's involvement because she cannot hide her condition. Accordingly, publication of her name is not a public disclosure of a hitherto private fact, and she has no potential lawsuit. The young man, on the other hand, is physically able to conceal his involvement. If he chooses to do so by shirking his responsibility to care

absolute defense from civil or criminal liability based upon speech. *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, —— U.S. ——, ——, 106 S. Ct. 1558, 1559 (1986); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *cf. Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979) ("Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards."). On the other hand, the Court has not foreclosed the possibility of civil liability for publication of the truth. *See Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967); *Garrison, supra*, at 72 & n.3.[14]

None of this Court's decisions addresses the issues presented by this petition. *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), is the only decision of this Court dealing with the particular type of invasion of privacy action involved in the instant case. There the Court held that a person could not constitutionally be held liable under this tort for publicizing the name of a rape victim obtained from public records. The Court deliberately kept its holding narrow, however, *see id.* at 491, 497 n.27, and its reasoning is heavily dependent on the specific fact that records of judicial proceedings were involved, *see id.* at 491-93. The Court has dealt twice with the constitutional

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for the child whom he fathered, as the respondent did in this case, see Transcript of Record [as submitted to the state supreme court] 94-95, under the decisions below not only is he able to escape public judgment for his conduct, but also he has a cause of action against one who, by disclosing his involvement, puts him on equal footing with the mother of his child. Such a sanctuary of anonymity does nothing to assist society in coping with this most pressing problem, but rather creates an atmosphere within which the problem may be expected to flourish.

[14] Commentators have questioned whether any form of tort liability for publicizing true facts can stand in the face of the constitutional protections for speech and press. *See* B. Sanford, Libel & Privacy: The Prevention and Defense of Litigation 459 (1985); Restatement (Second) of Torts § 652D special note (1977).

implications of civil liability for invasion of privacy based on the claim that a publication placed the plaintiff in a false light. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Hill, supra.* Such lawsuits are obviously more akin to defamation actions than to "private facts/public concern" actions. Thus, although the Court has "flirted" with the issue, "[t]he reach of the First Amendment in the private facts context is as yet unresolved . . . ." B. Sanford, *supra* note 14, at 442-43.

II. State courts and lower federal courts have reached conflicting results and developed conflicting standards as to the questions presented.

There is a direct conflict among the state and lower federal courts on the issue whether the question of public interest is for the judge to decide in the first instance or for the jury alone. In holding that the issue is one for the jury alone, the South Carolina Supreme Court has aligned itself with the decisions in *Virgil v. Time, Inc.*, 527 F.2d 1122, 1130 & n.13 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); *Briscoe v. Readers Digest Association, Inc.*, 4 Cal. 3d 529, 93 Cal. Rptr. 866, 875, 483 P.2d 34 (1971); and *Diaz v. Oakland Tribune*, 9 Med. L. Rptr. 1121, 1127 (Cal. App. 1983).

These holdings conflict directly with *Barber v. Time*, 159 S.W.2d 291, 1 Med. L. Rptr. 1779, 1782 (Mo. 1942); and *Williams v. KCMO Broadcasting Division*, 472 S.W.2d 1, 56 A.L.R.3d 378, 381 (Mo. App. 1971). In addition, in *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, 459, *cert. denied*, 423 U.S. 1025 (1975), the Colorado Supreme Court held in the context of a defamation action brought by a private individual that the issue whether the defamatory statements concerned a matter of public interest or concern is a question of law for the judge to decide. That holding would apply *a fortiori* in a "private facts/public concern" lawsuit. And in *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980), and *McNutt v. New Mexico State Tri-*

bune, 538 P.2d 804, 84 A.L.R.3d 1148 (N.M. 1975), the courts treated the issue as one of law without expressly holding to that effect. *See Campbell* at 397; *McNutt* at 807-09, 84 A.L.R.3d at 1152-55, 1157; *see also Gilbert v. Medical Economics Co.*, 665 F.2d 305, 309 & n.1 (10th Cir. 1981) (issue may be left to jury "in some cases," but Constitution requires closer judicial scrutiny of this issue than is usual for fact issues).

There is no direct conflict on the issue whether the Constitution requires clear and convincing proof of actual malice or absence of public interest. The holding below that *no* proof of actual malice is necessary to establish invasion of privacy, however, does conflict with the decisions of four other courts. *See Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1290 (D.D.C. 1981); *Briscoe, supra*, 93 Cal. Rptr. at 875-76; *Taylor v. K.T.V.B., Inc.*, 96 Idaho 202, 525 P.2d 984, 987-88 (1974); *McNutt, supra*, 84 A.L.R.3d at 1157. Each of these four courts held, as a matter of federal constitutional law, that some form of actual malice is necessary to hold a person liable in a "private facts/public concern" action.

The court below rejected the petitioner's argument that the newspaper had a constitutional privilege to identify the respondent in the side-bar article in order to illustrate the general subject of the main article. The court recognized that, under state law, there is no liability for publishing true facts concerning matters of public interest. *See infra* at 3a. It was undisputed that the general subject was one of legitimate public interest.[15] Thus, implicit in the state supreme court's rejection of the petitioner's argument on this point is the view that, while the general subject was of public interest, it was for the jury alone to decide whether the identification of the respondent was a matter of public interest. Other courts have applied this reasoning in similar cases. *See Briscoe, supra*, at 872; *Barber, supra*, at 1783.

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[15] *See supra* note 2.

This approach conflicts substantially with the logic applied, as a matter of federal constitutional law, by a number of other state and federal courts in analogous situations. *See Gilbert, supra,* at 308; *Dresbach, supra,* at 1291; *Neff v. Time, Inc.,* 406 F. Supp. 858, 861 (W.D. Pa. 1976); *Howard v. Des Moines Register,* 283 N.W.2d 289, 5 Med. L. Rptr. 1667, 1677 (Iowa 1979), *cert. denied,* 445 U.S. 904 (1980). The rationale underlying these decisions is well stated in the *Howard* opinion:

> "Plaintiff concedes the article in this case was newsworthy, but she asserts the disclosure of her identity was not. We do not believe the disclosure of her identity can be taken out of context.
>
> ". . . .
>
> "In the sense of serving an appropriate news function, the disclosure contributed constructively to the impact of the article. It offered a personalized frame of reference to which the reader could relate, fostering perception and understanding. Moreover, it lent specificity and credibility to the report.
>
> "In this way the disclosure served as an effective means of accomplishing the intended news function. It had positive communicative value in attracting the reader's attention to the article's subject matter and in supporting expression of the underlying theme.
>
> "Examined in the light of the first amendment, we do not believe the disclosure could reasonably be held to be devoid of news value." *Id.*

The conflict just discussed is not a direct conflict on the precise constitutional issue presented by the petitioner, and the holdings of these courts were closely tied to the facts of the individual cases. Nevertheless, the factual situations were sufficiently similar, and the courts' approaches sufficiently disparate, that it can be said with confidence that the *Gilbert, Dresbach, Neff,* and *Howard* courts would have resolved the instant case differently. Given the special need for coherence and predictability in

this area, *see infra* at 10-12, the conflict in principle reflected in these decisions warrants review by this Court.

III. This Court's resolution of the questions presented is necessary to provide guidance to the broadcasting and publishing media in reporting on matters of public concern.

One commentator has noted that, although defamation suits tend to be brought more frequently than invasion of privacy suits, "there is no doubt that editors tend to be more interested, even fearful, of the contemporary world of invasion of privacy than the time-worn terrain of libel." B. Sanford, *supra* note 14, at 427. Undoubtedly one reason for this fear is the uncertainty generated from both the lack of guidance from this Court and the conflicting standards among the lower courts, as discussed above. Another reason, perhaps the major reason, for the great uncertainty in this area, *see generally id.* at 428, lies in the nature of the tort itself: in most cases it is relatively easy to determine if a statement is defamatory and false, but determining whether a truthful fact might be considered a "private fact" that is of no legitimate public interest and that is offensive to the reasonable person is a subjective and speculative affair.

This Court, as well as individual Justices and commentators, has noted the special need for predictability and coherence in areas of the law in which there is a deterrent effect on the exercise of the rights of freedom of speech and of the press. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1974); *id.* at 354 (Blackmun, J., concurring); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 63 (1971) (Harlan, J., dissenting); L. Tribe, American Constitutional Law § 12-13 at 645-46 (1978).[16]

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[16] Accordingly, this Court has at times found it desirable to articulate specific "rules of the road" in order to provide guidance for the news media. *See Cox Broadcasting, supra* (presumption that material on the public record is a matter of public interest); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) (charge of criminal conduct is never irrelevant to official's or candidate's fitness for

Review of the questions presented by this petition would provide the Court the opportunity to lend greater certainty to this area of law in two ways. First, simply resolving the conflicts discussed above, even in a manner adverse to the petitioner's position, would assist publishers in making decisions on articles about matters of public concern that carry with them potential liability for invasion of privacy. Second, adopting the constitutional rules advocated by the petitioner would further certainty and predictability in this area of law, as well as allow full discussion of public issues without limiting the rights of individuals other than those involved with the issues.

This Court has at times expressed dissatisfaction with using "public interest" as a constitutional criterion. *See Gertz, supra,* at 346; *Time, Inc. v. Firestone,* 424 U.S. 448, 456 (1976). *But see Hepps, supra,* at ——, 106 S. Ct. at 1564. This dissatisfaction stems from an understandable reluctance to have judges passing on what is or is not a matter of public interest. But absence of public interest is an element of the "private facts/public concern" cause of action, and a constitutionally required element at that. Therefore, unless the Court should decide that this tort cannot coexist in any form with the Constitution, someone must determine in lawsuits such as the instant one whether the injurious statement concerned a matter of public interest.

The concerns that the Court has expressed with respect to having judges make determinations as to public interest are even more pronounced if this issue is left solely to the jury. *Cf. Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, ——, 104 S. Ct. 1949, 1960-62 (1984); *id.* at —— n.2, 104 S.Ct. at 1969 n.2 (Rehnquist, J., dissenting). There is an obvious danger that juries would use the flexibility inherent in determining public interest to punish unpopular speakers or ideas. While the danger

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office); *Greenbelt Cooperative Publishing Ass'n v. Bresler,* 398 U.S. 6 (1970) (use of word "blackmail" in rhetorical manner is not defamatory, as matter of constitutional law).

still exists if trial judges are called upon to make this determination, the danger can be controlled by appellate review more easily when the determination is embodied in a judge's order than when it is embodied in a jury verdict. Moreover, giving responsibility for making this determination in the first instance to the trial judge would lead to the evolution, through case-law development, of "rules of the road" to guide publishers and broadcasters. Such will never happen if the issue is always permitted to go to the jury.

Adopting a standard of "clear and convincing proof" with regard to actual malice and absence of public interest would also promote certainty and predictability and decrease the risk of self-censorship. Judging whether a particular statement will lead to liability in a "private facts/public concern" lawsuit is largely a matter of attempting to assess what the community considers to be appropriate to print. *See* Restatement (Second) of Torts § 652D comment h (1977). Because of the speculativeness involved in making such assessments, there is a strong argument that the "clear and convincing proof" standard is necessary to ensure that, in situations presenting a close call, publishers and broadcasters will not engage in self-censorship of information that the public has a legitimate right to know. Especially in this area of civil liability, the mere "preponderance of the evidence" standard is likely to induce speakers "to make only statements which 'steer far wider of the unlawful zone.'" *New York Times, supra,* at 279.

As to the third question presented, the constitutional privilege that the petitioner seeks to have this Court establish for identifying participants in case histories is an example of a "rule of the road" which publishers and broadcasters need to guide their editorial decisions. The justification for this privilege may be briefly stated. The Court frequently has noted that the historic function of the news media is to discuss "all issues about which in-

formation is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); *see also, e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967) (plurality opinion of Harlan, J.); A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 75 (1960). Relatively few members of our society are scholars, however; most do not learn of the "exigencies of their period" through research on abstract issues, but rather through the concrete lessons of the experiences of themselves and others. The use of case histories to illustrate general articles plays a vital educational role in this regard. Requiring the news media to provide anonymity to participants in such case histories would have a serious deleterious effect on this educational function. In the words of the Iowa Supreme Court, identifying the participant "offer[s] a personalized frame of reference to which the reader [can] relate, fostering perception and understanding. Moreover, it len[ds] specificity and credibility to the report." *Howard, supra*, 5 Med. L. Rptr. at 1677. As a matter of constitutional law, such speech should be protected.

The Court has often remarked on the difficulty in defamation cases of establishing rules that would provide the needed "breathing space" for free speech while not creating a shelter for irresponsible or malicious speakers. *See, e.g., Hepps, supra*, at ——, 106 S. Ct. at 1564-65; *Gertz, supra*, at 342. The petitioner does not seek a shelter for irresponsible journalism. In the context of the instant case, the petitioner's only fault lay not in publishing an untruth, but rather in misjudging what truth the community, as represented by the particular jury drawn to decide this case, considers appropriate to print. It is ironic, to say the least, that the existing common law system of liability for publicizing truthful but private facts permits a publisher to identify the participants in any number of events that may be newsworthy but have

no real social or political significance,[17] but accords a jury virtually unfettered discretion to punish a publisher who uses a case history to illustrate a pressing and pervasive social problem. In reporting on a problem such as the subject of the article in this case, the press should not be required to thread its way through a minefield of privacy claims in its efforts to communicate effectively the nature and scope of the problem in ways that the reader will understand and remember.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari to the Supreme Court of the State of South Carolina.

Respectfully submitted,

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September 10, 1986

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[17] *See, e.g.*, Restatement (Second) of Torts § 652D comment g (1977):

> "Included within the scope of legitimate public concern are matters of the kind customarily regarded as 'news.' . . . Authorized publicity includes publications concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophies of nature, a death from the use of narcotics, a rare disease, the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report to the police concerning the escape of a wild animal and many other similar matters of genuine, even if more or less deplorable, popular appeal."

APPENDIX

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APPENDIX

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CRAIG HAWKINS, by and through his Guardian ad Litem, Linda Hawkins,

Respondent.

vs.

MULTIMEDIA, INC.,

Appellant.

Appeal From Spartanburg County
Jonathan Z. McKown, Judge

Opinion No. 22496

Heard November 19, 1985—Filed March 11, 1986

AFFIRMED

David L. Freeman and Carl F. Muller, both of Wyche, Burgess, Freeman & Parham, of Greenville, for Appellant.

C. Robert Faucette and Terry Haselden, both of Faucette and Rudasill, of Spartanburg, for Respondent.

NESS, C.J.: This is an action by a minor child, respondent Craig Hawkins, against appellant Multimedia for invasion of privacy. Craig obtained a verdict against Multimedia for $1,500 actual and $25,000 punitive damages. We affirm.

Multimedia published a story in its newspaper concerning the problem of teenage pregnancies. A sidebar article identified Craig as the teenage father of an illegitimate child. The majority of the article focused on the unmarried teenage mother.

The teenage mother told Multimedia's reporter that Craig was the father of her child. The reporter called Craig's home, identified herself to Craig's mother and engaged her in conversation. She reached Craig in a later telephone call, identified herself and asked him questions. Craig was reluctant to answer questions and terminated the conversations in three or four minutes. In neither call did the reporter request permission to identify or quote Craig.

The trial judge charged the jury, over Multimedia's objection, that a minor cannot consent to an invasion of his privacy. Multimedia asserts this was error. We find it unnecessary to reach this issue. Invasion of privacy is a cause of action sounding in tort. *Rycroft v. Gaddy*, 281 S. C. 119, 314 S. E. 2d 39 (S. C. App. 1984). A defendant may avoid liability for invasion of privacy by showing the injured party consented to the publication of facts about his private life. 62 Am. Jur. 2d, *Privacy*, Section 18. Since consent is a matter to be raised by the defendant, it has the burden of proof on that issue. See, *O'Neal v. Carolina Farm Supply of Johnston*, 279 S. C. 490, 309 S. E. 2d 776 (S. C. App. 1983). Consent may be found where the evidence shows a voluntary agreement to do something proposed by another, and the party consenting possesses sufficient information and ability to make an intelligent choice. 15A CJS, *Consent*, pp. 573-577.

Multimedia failed to introduce any evidence of Craig's consent. While Craig did not terminate the conversation immediately, it was brief and he was "very shy." The reporter never asked Craig if she could use his name in a newspaper article. Craig understood the newspaper was doing a "survey" on teenage pregnancy, and he was never

told he would be identified in an article. Since there was no evidence of Craig's consent, we need not decide the standard by which a minor's consent is to be determined.

Multimedia next asserts the trial judge erred in not directing a verdict in its favor because the matter reported was of general interest. The right of privacy does not prohibit the publication of matters which is of legitimate public or general interest. Public or general interest does not mean mere curiosity, and newsworthiness is not necessarily the test. *Meetze v. Associated Press*, 230 S. C. 330, 95 S. E. 2d 606 (1956). *See* also, *Rycroft v. Gaddy, supra.* We held in *Meetze, supra,* that a twelve-year-old girl giving birth to a child was "biological occurrence which would naturally excite public interest." *Id.* at 610. Ordinarily, however, whether a fact is a matter of public interest is a question of fact to be decided by the jury. We find no error in submitting this issue to the jury.

Multimedia also asserts error in the refusal of the trial judge to charge that malice must be shown by clear and convincing evidence. Malice need not be shown to recover for invasion of privacy. 62 Am. Jur. 2d, Privacy, Section 15. Malice is relevant only when the plaintiff is seeking punitive damages. *Id.* Section 47. The issue of the burden of proof for punitive damages was not raised at trial, and may not be raised for the first time on appeal. *Hubbs v. Government Employees Insurance Company,* Op. No. 22442 (filed January 13, 1986).

Multimedia's remaining exceptions are without merit and are affirmed pursuant to Supreme Court Rule 23.

AFFIRMED.

GREGORY, HARWELL, CHANDLER and FINNEY, JJ., concur.

[SEAL]

THE SUPREME COURT OF SOUTH CAROLINA

CLYDE N. DAVIS, JR.
Clerk

BRENDA F. SHEALY
Deputy Clerk

P.O. Box 11330
Columbia, S.C. 29211
758-3741

May 13, 1986

David L. Freeman, Esquire
Carl F. Muller, Esquire
Post Office Box 10207
Greenville, South Carolina 29603

Re: Hawkins, etc. v. Multimedia, Inc.

Gentlemen:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition denied.

/s/ J. B. Ness C.J.

/s/ George T. Gregory, Jr. A.J.

/s/ David W. Harwell A.J.

/s/ A. Lee Chandler A.J.

/s/ Ernest A. Finney, Jr. A.J.

May 13, 1986."

The remittitur in this matter is being forwarded to the Clerk of Court for Spartanburg County.

Sincerely yours,

/s/ Clyde N. Davis, Jr.
Clerk

CND,Jr/krp

cc: Terry Haselden, Esquire

COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

C.A. No. 81-CP-42-1275-2

LINDA HAWKINS and CRAIG HAWKINS, by and through his Guardian ad Litem, LINDA HAWKINS,
Plaintiffs,

—vs—

MULTIMEDIA, INC.,
Defendant.

ORDER

These matters come before me through the post trial motions of the plaintiff, Linda Hawkins, and defendant in this case. At trial, the jury awarded the plaintiff Craig Hawkins, $1,500 actual damages and $25,000 punitive damages. In the case of the plaintiff, Linda Hawkins, the jury refused to award any damages.

At the conclusion of the trial, the defendant moved for judgement notwithstanding the verdict, and in the alternative for a new trial absolute or a reduction of the verdict as to punitive damages subject to a new trial nisi. Plaintiff Linda Hawkins moved for a new trial additur in her case. Counsel for both plaintiff and defendant have submitted briefs in support of their motions to aid the court in its determination of these matters.

Defendant's motion for judgement notwithstanding the verdict in the case of Craig Hawkins is denied. The defendant asserted that the published matter was true, of general interest, had previously been made public, and

that actual malice on the part of the defendant was not proven. However, truth is no defense to an action for invasion of privacy. *Meetze v. Associated Press*, 230 S.C. 303, 96 S.E. 2d 606 (1956). Actual malice is not a requisite element of the tort of invasion of privacy. *Middlebrooks v. Curtis Publishing Co.*, 281 F. Supp. 1 (D.S.C. 1968). The defendant's allegations of general interest and prior publicity are questions of fact upon which conflicting evidence was presented to the jury. The jury's verdict is supported by strong evidence which indicates that the published matter was not of general interest and had not been previously published to the entire community.

The defendant's motion for a reduction of the verdict is also denied. The argument by the defendant that the punitive damages must be reduced due to their disproportionality to actual damages is not supported by law. Our courts has repeatedly held that punitive damages need not be proportionate to the actual damages. *Thompson v. Home Security Life Insurance*, 271 S.C. 54, 244 S.E. 2d 533 (1978); *Hicks v. Herring*, 246 S.C. 429, 144 S.E. 2d 151 (1965); *Charles v. Texas Co., et al.*, 199 S.C. 156, 18 S.E. 2d 719 (1942). The case of *Campus Sportswear v. M. B. Kahn Construction Co.*, 515 F. Supp. 64, aff'd 644 F. 2d 877 (4th Cir. 1981) explains the factors to be considered in determining punitive damages:

> The admonitory function of punitive damages does not lend itself to formulation. For one thing, a survey of South Carolina cases indicates that there has never been an agreement on ratios. There is no definite mathematical rule as to the proportion that that [*sic*] punitive should bear to actual damages . . . . One must look to behavior, not to results, to determine the need to admonish and one must look to the wealth of the defendant to determine the amount which must be awarded to accomplish that result. 515 F. Supp., at 106

This court finds that the confidential matter of the published information, the defendant's status as a youthful private individual, the recklessness involved of the defendant's publication, and the magnitude of the defendant's wealth are all factors which justify the punitive damages award.

The defendant's assertion that a new trial should be granted on the basis that this court's refusal to instruct actual malice as an element of invasion of privacy is without merit. Our court has held that actual malice need not be proven in order to establish liability for an invasion of privacy. *Middlebrooks, supra.* While some United States Supreme Court authorities support the contention that malice is required as an element of proof in order to establish a cause of action, these cases are all defamation and defamatory false light invasion of privacy cases. The present case alleges no defamation. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1979), the U.S. Supreme Court held that actual malice is not an element of an invasion of privacy action involving a private citizen. The state interest in compensating injury to private citizens was held to require application of a different rule from that of public figures. The *Gertz* case, *supra*, held:

> States should retain latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual . . . and so long as they do not impose liability without fault the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. 94 S. Ct., at 3010.

The defendant also asserts that this court improperly charged the jury when it charged that a minor could not give his own consent to allege to [*sic*] invasion of his pri-

vacy. *Dixon v. U.S.*, 197 F. Supp. 798 (D.S.C. 1962) held that:

> In the absence of bad faith, the doctrine of waiver or consent does not apply to a minor, nor can he consent to the violation of his rights, and his rights cannot be waived by persons not authorized by law [to] do so. 197 F. Supp. at 803

This court designed its jury instruction on consent in accordance with the holding in *Dixon, supra.* Therefore, its instructions were proper. Although the recent holding in *T. Z. Standard v. Shine*, Opinion No. 21792 (S.C. Sup. Ct. Sept. 20, 1982) held that a minor may be found negligent if his behavior does not meet a standard to be expected of a child of like age, experience, and intelligence, the *Shine* case does not address the issue of consent. The doctrine of negligence is not at issue in this case.

Plaintiff Linda Hawkins' post trial motion for a new trial additur is denied. Plaintiff Linda Hawkins asserts that the jury found for her as to liability yet awarded neither actual damages nor nominal damages. The verdict form returned by the jury in this case read as follows:

> We find for the plaintiff Linda Hawkins in the amount of 0 dollars actual damages and 0 dollars punitive damages.

At first glace, this appears to support the plaintiff's allegation, however, the verdict form provided to the jury failed to leave a space for the jury to find for the defendant in the case of Linda Hawkins by herself. Therefore, the jury's finding of no actual damages and no punitive damages was actually a finding for the defendant in this matter. The jury verdict in favor of the defendant in the case of plaintiff Linda Hawkins could have been based upon evidence in the record that her privacy was not invaded. Therefore, the plaintiff Linda Hawkins' motion for a new trial additur is denied.

WHEREFORE, all of the plaintiff's and the defendant's post trial motions in the above captioned case are denied and the verdict of the jury is upheld.

IT IS SO ORDERED.

/s/ Johnathan Z. McKown
JONATHAN Z. MCKOWN
Presiding Judge of the
7th Judicial Circuit

Dec. 11, 1983

Gaffney, SC

PREGNANCY JOINS LIST OF TEEN-AGE CONCERNS

Stories by LORI KEESEY
News staff writer

Mar. 15, 1981

Kimberly Harris, a precociously passionate teenager on the soap opera "Ryan's Hope," has experienced two pregnancies—one faked and the other aborted.

Rather racy stuff, one might assume.

But strip away the Hollywood embroidery and one bare fact remains. Kimberly Harris is not that unusual.

Every day, thousands of teen-agers discover they are pregnant.

And the problem is apparently growing.

At least 1 million teen-age girls between the ages of 15 and 19 get pregnant each year, a U.S. House select committee on population reported in 1978.

And a recent Johns Hopkins University study revealed that half of the nation's teen-age girls living in urban areas were no longer virgins.

Although more claimed to be using contraception on a regular basis than in previous studies, the report said the incidence of pregnancy among sexually active teenagers jumped from 28 percent in 1971 to 33 percent in 1979.

In South Carolina, the problem appears worse than in most other states.

"Forty-eight states in this country have less teen-age pregnancy than we do," said Dr. Harold Rubel, head of the obstetrics and gynecology department at Spartanburg General Hospital.

In the most recent statistics available, the state Department of Health and Environment Control reported three years ago that 10,430 babies were born to girls in the state age 19 and younger.

But the problem is more complex than a mere listing of numbers.

Teen-age pregnancies are considered high-risk pregnancies. Not only does the young mother face complicated health risks, but so does her child.

The problem also touches on economics, social attitudes and perhaps the most controversial question of all: Should schools get involved?

But one thing is certain. Teen-age pregnancy is an awesome problem and one that affects all segments of the population.

There aren't any easy answers, professionals say.

It is a well know fact, they say, that young girls stand a greater chance of giving birth to physically and mentally handicapped babies.

Eventually, their pregnancies become society's problems because the federal government requires all states to provide training for the handicapped, Rubel said.

Young mothers also are more likely to develop toxemia, anemia and prolonged labor. Toxemia is a form of blood poisoning considered to be extremely dangerous.

The infants of young mothers are two to three times more likely to die within the first year of life because of poor pre-natal and post-natal care, said Linda Anderson, coordinator of the Improved Pregnancy Outcome Project, a federal program.

The project was set up to help reduce the nation's infant mortality rate.

"You're talking about a community problem." The state's high infant mortality rate is directly linked to teen-age pregnancy, she said.

The mothers are "little kids and they (act) like little kids," Rubel said. "Their idea of good nutrition is a Pepsi and a moon pie."

Because many teen-agers wait well into their sixth or seventh month of pregnancy before seeking medical help, they do not benefit from medically supervised diets or child-care training.

Economic problems also arise.

Statistics provided by the Greenville-Pickens health district claim that nine out of every 10 pregnant girls under age 15 never finish school.

Many wind up on welfare roles because they lack job skills and child care services.

In light of these risks, why do the nation's teen-agers have the highest childbearing rate among teen-agers in the world?

"We are bombarded with sex now," Rubel said. "I don't think X-rated movies are as bad as what we see on television.

"Invariably through the course of a James Bond movie, he jumps in bed with a woman. Even commercials are very, very suggestive," Rubel added.

"Girls figure they have to be the same way," he said. "They know that's what boys like."

Society has changed as well.

"It's not a hushed subject," said Kitty Silverman, director of the family planning clinics for the Appalachia III Health District. "Schools don't think they should teach (sex education), but it's going on in the hallways."

Rubel believes teen-agers' access to money and transportation also have contributed to the problem.

Mrs. Silverman said there are also physical developments which account partly for the rising pregnancies among teen-agers.

Several decades ago, the average teen-age girl started menstruating when she was about 16. Now the average age is 12.2 years, she said.

She attributes the change to improved diets and food processing techniques.

And as the girls' bodies begin to change, so do their interests in boys.

They tend to be attracted to older males—the 16- and 17-year-olds who have reached a peak in sexual desire.

"That's the age we're saying no sex," Mrs. Silverman said.

Also, the stigma of an out-of-wedlock pregnancy no longer exists, said Sheila Howard, a nurse who runs the high-risk pregnancy clinic at Spartanburg General Hospital.

"It doesn't really bother (teen-agers)," Mrs. Howard said. "Adolescents are just having sex sooner and sooner."

Unless mores change, professionals believe there is little anyone can do to prevent a teen-ager from having sex.

But they insist the number of unwanted pregnancies can be reduced if schools, churches and parents take a more active role in teaching sex education.

"The thing is preventing (pregnancy)," said Peggy Bolin, a Spartanburg County District 3 School nurse.

"Parents need to understand that a third of the kids are naive. They don't know why they have a period. But as a parent, you don't always know where to go for information," she said.

And though many parents don't know how to explain human sexuality to their children, many of the same parents pooh-pooh the idea of schools getting involved.

As a result, sex education in the schools has become a volatile subject. And that volatility has forced Spartanburg County school officials to approach the topic in a variety of ways.

They range from virtually no sex education in District 2 to specific, detailed instruction in District 6.

About a year ago, a high school biology class in District 1 became the center of controversy when parents protested the explicitness of its nine-week sex education course.

The storm resulted in a committee, formed to devise a new sex education curriculum. The program is to begin this spring.

Many parents also fear that by teaching contraception and human sexuality, teen-agers will become promiscuous.

"That's not true," Rubel said. "Because kids aren't virgins when they come (to the hospital's high risk pregnancy clinic)."

"The only virgins we might see are the those who are getting ready to get married," Mrs. Silverman added.

Acceptance of sex education, however, has come a long way, Rubel said.

And because of South Carolina's minors law, which was passed several years ago, teen-agers have easier access to contraception.

If a doctor believes a patient needs his services, he doesn't need parental permission before providing that treatment.

But in spite of these strides, many young people are still misinformed.

"There are some kinds around South Carolina who do not know family planning services are available to them on a free basis," Rubel said.

'I THOUGHT ABOUT ASKING FOR BIRTH CONTROL PILLS'

Greer—Though her younger sister got pregnant at 12, Joanne Ballenger, 16, never dreamed it would happen to her.

Four months ago, the Byrnes High School sophomore gave birth to a 5-pound, 15-ounce baby girl, whom she named Tomeka.

And as the unmarried mother held her sleeping child recently, she seemed confident the child would neither change her lifestyle nor her future plans.

"It happens. You may as well not be ashamed about it," she said.

"I don't feel like a mother, (Tomeka) feels like someone else's child and I just keep her," Miss Ballenger added.

But when Miss Ballenger found out she was pregnant, she sang a different song. She was six months pregnant, and too far along to abort even if she wanted to.

"I was shocked," said 16-year-old Craig Hawkins, Tomeka's father.

However, Miss Ballenger registered more than just shock.

"At first I just hated (Craig)," she said. "I knew I wouldn't be able to go anywhere and he would."

At that point in her life, Miss Ballenger wasn't alone.

Each day hundreds of teen-agers find out they are pregnant. And probably many of them don't know how they got themselves into the predicament.

"These girls are ignorant of birth control," said Shelia Howard, a nurse who runs Spartanburg General Hos-

pital's high-risk pregnancy clinic, where Miss Ballenger received prenatal care.

"I had two girls who did not know how they got pregnant and one who thought her baby was a tumor," she added.

"I totally agree sex education should be taught at home," she said. "But there will always be those (parents) who don't."

Linda Hawkins is a parent who believes in spelling it out to teen-agers.

"I never kept anything away from my boys," said Craig's 40-year-old mother. "And I told them if you bring one in the world, you have to raise him."

But apparently her advice fell on deaf ears.

"I was disappointed in him," Mrs Hawkins said. "Craig is still a baby. He doesn't know how to be a daddy."

But Miss Ballenger doesn't foresee any problems raising Tomeka.

Her mother and sister take care of Tomeka while Miss Ballenger is in school, and she says she takes over from there.

Hawkins visits Tomeka about three times a week, and according to him, he plans to take care of the baby in any way he can.

Marriage is out of the question, Miss Ballenger added.

"I've got to finish college," she said. "I haven't even thought about getting married.

"Maybe later on I'll get married. I might even marry someone else (other than Hawkins)," she added.

"(The pregnancy) is more of my fault than anybody," Miss Ballenger said. "I thought about asking for birth control pills, but I never did."

But she said things turned out better than she originally thought.

"Usually when you get pregnant, everybody talks about you," she said. "But it turned out differently. It turned out a lot better than what I thought it would."

Miss Ballenger isn't the only mother at Byrnes High School.

Hawkins said people talk about their sexual escapades, and at least two of his friends are parents.

"And another (baby) is on the way," he said.

Supreme Court, U.S.
FILED
NOV 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-390

In The
Supreme Court of the United States
October Term, 1986

MULTIMEDIA, INC.,

Petitioner,

v.

CRAIG HAWKINS, by and through his Guardian ad Litem, Linda Hawkins,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner has alleged that there are three questions which warrant writ of certiorari. The alleged questions raised by defendant are:

1. In an action for invasion of privacy, do the First and Fourteenth Amendments to the United States Constitution require that the trial judge determine in the first instance whether the publication was privileged because it involved a matter of public interest?

2. In such an action, do the First and Fourteenth Amendments to the United States Constitution require the plaintiff to prove the absence of public interest and a variant of "actual malice" and to do so by clear and convincing evidence?

3. In such an action, if the general subject of the publication admittedly deals with a matter of public interest, is there a privilege under the First and Fourteenth Amendments to the United States Constitution to identify a participant in a case history used to illustrate the general subject of the publication?

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No. 86-390

In The
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MULTIMEDIA, INC.,

Petitioner,

v.

CRAIG HAWKINS, by and through his Guardian ad Litem, Linda Hawkins,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Craig Hawkins, by and through his guardian ad litem, Linda Hawkins, respectfully prays that the petition for a writ of certiorari to review the judgment of the Supreme Court of the state of South Carolina, entered in the above captioned proceeding on March 11, 1986, be denied.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at 288 S.C. 569, 344 S.E.2d 145. It is reprinted in the appendix to this brief, infra at page 1a. The order of the trial denying petitioner's post trial motions is reprinted in the appendix at page 5a.

———o———

JURISDICTION

The South Carolina Supreme Court entered judgment on March 11, 1986, affirming the trial court's judgment on the verdict for the respondent. On May 13, 1986, the state Supreme Court denied petitioner's petition for rehearing. On September 10, 1986 petitioner filed its petition for writ of certiorari. On October 1, 1986 the clerk of court for the Supreme Court of the United States granted respondent an extension of time up to and including November 9, 1986 in which to file a reply to the petition. The jurisdiction of this court is invoked under 28 U.S.C. 1257 (3).

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

———o———

STATEMENT OF THE CASE

This matter arises from the publication by the petitioner, through one of its newspapers, the Greenville News, on March 15, 1981, of an article concerning out of wedlock teenage pregnancies. As a "side-bar" or related article to a general article on the subject, the newspaper printed a story which focused on a case history involving the plaintiff as the father of an illegitimate child. The plaintiff commenced this action by service of summons and complaint on July 7, 1981, in which he alleged invasion of privacy by virtue of public disclosure of private facts.

The case went to trial before a jury, which on May 27, awarded the plaintiff $1,500 actual damages and $25,000 punitive damages. Prior to the jury's verdict the defendant had moved for a directed verdict arguing, inter alia, that the subject of the article in question was a matter of legitimate public interest and therefore was constitutionally privileged. This motion was denied.

Subsequent to the jury's verdict the petitioner renewed its prior motion by way of a motion for judgment notwithstanding the verdict. This motion was also denied. The trial court also denied petitioner's motions for a directed verdict and judgment notwithstanding the verdict, which were also made on the grounds that the plaintiff was required to prove actual malice in an invasion of privacy action.

The petitioners raised these issues, and others, on appeal to the South Carolina Supreme Court. That court, in referring to the prior case of *Meetze v. Associated*

Press, 230 S.C. 330, 95 S.E.2d 606 (1956) indicated that in some cases certain occurrences could, as a matter of law, be found to be of public interest. The court went on to say, however, that such determinations are normally a question of fact to be determined by the jury. They found no error in submitting the issue to the jury. (See infra at page 3a.

The South Carolina Supreme Court did not hold, contrary to what the petitioner has indicated, that the question of public interest is always one for the jury. The court also held, in compliance with existing law, that malice need not be shown in order to prove a cause of action for invasion of privacy. They held malice to be relevant only on the issue of punitive damages.

The court also noted that the petitioner had not properly raised the issue of the burden of proof for punitive damages as required by state procedural rules. The court thereupon affirmed the finding of the trial court and subsequently denied petitioner's petition for rehearing in this matter.

SUMMARY OF ARGUMENT

Petitioner's primary argument is essentially that the trial judge erred in not making a threshold determination on the question of public interest. They argue that the trial judge held that such questions are *solely* for the jury. It is clear from the record that the trial judge implicitly made such a threshold determination and decided that the proof of public interest was not conclusive *as a matter*

of law. The South Carolina Supreme Court properly found that there was a question of fact on this issue and that is was properly submitted to a jury.

As a corollary to its primary argument, petitioner also argues that this court should adopt an absolute rule that the press has a blanket right to illustrate an article on any matter of public interest by focusing on a particular individual. Such an argument would effectively destroy any right of action which an individual might have for public disclosure of private facts.

Petitioner's final argument is that the respondent failed to prove "the absence of public interest and a variant of actual malice and to do so by clear and convincing evidence." Petitioner ignores the fact that actual malice has never been an element of the tort invasion of privacy by public disclosure of private facts, except as to punitive damages. It also ignores the fact, as indicated by the South Carolina Supreme Court, that the petitioner failed to comply with state procedural requirements with regard to raising the issue of the standard proof of actual malice in order to recover punitive damages.

ARGUMENT

I. The trial court implicitly considered the issue of whether the subject matter of this action was privileged as being a matter of legitimate public interest in the passing on petitioner's motion for directed verdict and judgment notwithstanding the verdict.

The record clearly indicates that the trial court on two separate occasions considered the issues of public interest. Though it is not explicitly stated in the trial judge's order that he considered this issue it is obviously implicit from the fact that he denied both of petitioner's motions. Petitioner alleges that both the trial judge and the South Carolina Supreme Court held that such questions of public interest are always jury questions. This is simply not the holding of either the trial judge or the South Carolina Supreme Court. On the contrary, their orders indicate that such questions must be addressed on a case by case basis. Both courts concluded that in this case there was a sufficient conflict in the evidence to submit the matter to a jury. Apparently, the jury also agreed that there was no public interest privilege in this case.

II. The absolute rule which the petitioner advocates with regard to cases of this type would effectively prohibit any actions ever being brought against a newspaper for public disclosure of private facts.

From the cases cited in the appellant's petition, it would appear that the petitioner subscribes to the theory held by some that when a matter is newsworthy or of general public interest, the first amendment right of free

speech allows the media to publicize the persons involvement without fear of civil liability. Under such a theory, the first amendment interest would *always* win out over an individual's privacy interest. Fortunately the courts have not adopted such an approach. *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942); *Virgil v. Time, Inc.* 527 F.2d 1122 (9th Cir. 1975); *Briscoe v. Readers Digest Association*, 4 Cal. 3rd 529, 93 Cal. Rptr. 866, 438 P.2d 34 (1971); *Massachusetts v. Wiseman*, 249 N.E.2d 610 (1969); *Patterson v. Tribune Company*, 146 So.2d 623 (1962); *Feeney v. Young*, 191 App. Div. 501, 181 N.Y.S. 481 (1920); *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931).

These cases all stand for the proposition that even if a general subject might be of legitimate public interest, the individuals who are involved with activities covered by that general subject do not necessarily lose all rights of privacy. As indicated by the petitioner in its brief there are other cases which indicate that a person involved in matters of legitimate public interest had lost their right to privacy from the disclosure of private facts. The important thing to recognize is that these cases do not stand for the blanket rule which petitioner advocates but rather are limited exclusively to their facts. The courts across the country have addressed such cases on a case by case basis and should continue to do so. Contrary to what it indicates in its brief, petitioner does indeed appear to be seeking a shelter for irresponsible journalism.

III. Adopting a clear and convincing evidence standard of proof would serve no other purpose than to limit the rights of privacy of individuals.

Petitioner asks this court to adopt a clear and convincing evidence standard of proof in such invasion of privacy cases. It argues by analogy that such proof is required in libel and slander cases and should therefore be required in invasion of privacy cases. Petitioner fails to recognize that the tort of invasion of privacy is, by its very nature, a less malicious tort than libel or slander, and therefore should not require as great a degree of proof. It has long been held that such matters should be left to the states to formulate their own proof requirements. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1979). Cases like the present one require a great deal of balancing of competing interests. To require proof by clear and convincing evidence would tilt the balance in the favor of the media in all such cases.

For the foregoing reasons, the court should deny the petition for writ of certiorari to the Supreme Court of the State to South Carolina.

Respectfully submitted,

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APPENDIX

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CRAIG HAWKINS, by and through his Guardian ad Litem, Linda Hawkins,

Respondent.

vs.

MULTIMEDIA, INC.,

Appellant.

Appeal from Spartanburg County
Jonathan Z. McKown, Judge

Opinion No. 22496

Heard November 19, 1985—Filed March 11, 1986

AFFIRMED

David L. Freeman and Carl F. Muller, both of Wyche, Burgess, Freeman & Parham, of Greenville, for Appellant.

C. Robert Faucette and Terry Haselden, both of Faucette and Rudasill, of Spartanburg, for Respondent.

NESS, C.J.: This is an action by a minor child, respondent Craig Hawkins, against appellant Multimedia for invasion of privacy. Craig obtained a verdict against Multimedia for $1,500 actual damages and $25,000 punitive damages. We affirm.

Multimedia published a story in its newspaper concerning the problem of teenage pregnancies. A side-bar article identified Craig as the teenage father of an illegiti-

mate child. The majority of the article focused on the unmarried teenage mother.

The teenage mother told Multimedia's reporter that Craig was the father of her child. The reporter called Craig's home, identified herself to Craig's mother and engaged her in conversation. She reached Craig in a later telephone call, identified herself and asked him questions. Craig was reluctant to answer questions and terminated the conversations in three or four minutes. In neither call did the reporter request permission to identify or quote Craig.

The trial judge charged the jury, over Multimedia's objection, that a minor cannot consent to an invasion of his privacy. Multimedia asserts this was error. We find it unnecessary to reach this issue. Invasion of privacy is a cause of action sounding in tort. *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (S.C. App. 1984). A defendant may avoid liability for invasion of privacy by showing the injured party consented to the publication of facts about his private life. 62 Am. Jur. 2d, Privacy, Section 18. Since consent is a matter to be raised by the defendant, it has the burden of proof on that issue. See, *O'Neal v. Carolina Farm Supply of Johnston*, 279 S.C. 490, 309 S.E.2d 776 (S.C. App. 1983). Consent may be found where the evidence shows a voluntary agreement to do something proposed by another, and the party consenting possesses sufficient information and ability to make an intelligent choice. 15A CJS, Consent, pp. 573-577.

Multimedia failed to introduce any evidence of Craig's consent. While Craig did not terminate the conversation immediately, it was brief and he was "very shy." The

reporter never asked Craig if she could use his name in a newspaper article. Craig understood the newspaper was doing a "survey" on teenage pregnancy, and he was never told he would be identified in an article. Since there was no evidence of Craig's consent, we need not decide the standard by which a minor's consent is to be determined.

Multimedia next asserts the trial judge erred in not directing a verdict in its favor because the matter reported was of general interest. The right of privacy does not prohibit the publication of matters which is of legitimate public or general interest. Public or general interest does not mean mere curiosity, and *newsworthiness is not necessarily the test. Meetze v. Associated Press,* 230 S.C. 330, 95 S.E.2d 606 (1956). See also, *Rycroft v. Gaddy,* supra. We held in *Meetze,* supra, that a twelve-year-old girl giving birth to a child was "biological occurrence which would naturally excite public interest." Id. at 610. Ordinarily, however, whether a fact is a matter of public interest is a question of fact to be decided by the jury. We find no error in submitting this issue to the jury.

Multimedia also asserts error in the refusal of the trial judge to charge that malice must be shown by clear and convincing evidence. Malice need not be shown to recover for invasion of privacy. 62 Am. Jur. 2d, Privacy, Section 15. Malice is relevant only when the plaintiff is seeking punitive damages. Id. Section 47. The issue of the burden of proof for punitive damages was not raised at trial and may not be raised for the first time on appeal. *Hubbs v. Government Employees Insurance Company,* Op. No. 22442 (filed January 13, 1986).

Multimedia's remaining exceptions are without merit and are affirmed pursuant to Supreme Court Rule 23.

AFFIRMED.

GREGORY, HARWELL, CHANDLER and FINNEY, JJ., concur.

COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

C.A. No. 81-CP-1275-2

LINDA HAWKINS and CRAIG HAWKINS, by and through his Guardian ad Litem, LINDA HAWKINS,

Plaintiffs,

—vs—

MULTIMEDIA, INC.,

Defendant.

ORDER

These matters come before me through the post trial motions of the plaintiff, Linda Hawkins, and defendant in this case. At trial, the jury awarded the plaintiff Craig Hawkins, $1,500 actual damages and $25,000 punitive damages. In the case of the plaintiff, Linda Hawkins, the jury refused to award any damages.

At the conclusion of the trial, the defendant moved for judgement notwithstanding the verdict, and in the alternative for a new trial absolute or a reduction of the verdict as to punitive damages subject to a new trial nisi. Plaintiff Linda Hawkins moved for a new trial additur in her case. Counsel for both plaintiff and defendant have submitted briefs in support of their motions to aid the court in its determination of these matters.

Defendant's motion for judgment notwithstanding the verdict in the case of Craig Hawkins is denied. The defendant asserted that the published matter was true,

of general interest, had previously been made public, and that actual malice on the part of the defendant was not proven. However, truth is no defense to an action for invasion of privacy. *Meetze v. Associated Press,* 230 S.C. 303, 96 S.E. 2d 606 (1956). Actual malice is not a requisite element of the tort of invasion of privacy. *Middlebrooks v. Curtis Publishing Company,* 281 F. Supp. 1 (D.S.C. 1968). The defendant's allegations of general interest and prior publicity are questions of fact upon which conflicting evidence was presented to the jury. The jury's verdict is supported by strong evidence which indicates that the published matter was not of general interest and had not been previously published to the entire community.

The defendant's motion for a reduction of the verdict is also denied. The argument by the defendant that the punitive damages must be reduced due to their disproportionality to actual damages is not supported by law. Our court has repeatedly held that punitive damages need not be proportionate to the actual damages. *Thompson v. Home Security Life Insurance,* 271 S.C. 54, 244 S.E.2d 533 (1978); *Hicks v. Herring,* 246 S.C. 429, 144 S.E.2d 151 (1965); *Charles v. Texas Co., et al,* 199 S.C. 156, 18 S.E.2d 719 (1942). The case of *Campus Sportswear v. M.B. Kahn Construction Co.,* 515 F. Supp. 64 aff'd 644 F.2d 877 (4th Cir. 1981) explains the factors to be considered in determining punitive damages:

> The admonitory function of punitive damages does not lend itself to formulation. For one thing, a survey of South Carolina cases indicates that there has never been an agreement on ratios. There is no definite mathematical rule as to the proportion that that

> (sic) punitive should bear to actual damages . . . . One must look to behavior, not to results, to determine the need to admonish and one must look to the wealth of the defendant to determine the amount which must be awarded to accomplish that result. 515 F. Supp., at 106

This court finds that the confidential matter of the published information, the defendant's status as a youthful private individual, the recklessness involved of the defendant's publication, and the magnitude of the defendant's wealth are all factors which justify the punitive damages award.

The defendant's assertion that a new trial should be granted on the basis that this court's refusal to instruct actual malice as an element of invasion of privacy is without merit. Our court has held that actual malice need not be proven in order to establish liability from an invasion of privacy. *Middlebrooks*, supra. While some United States Supreme Court authorities support the contention that malice is required as an element of proof in order to establish a cause of action, these cases are all defamation and defamatory false light invasion of privacy cases. The present case alleges no defamation. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1979), the U.S. Supreme Court held that actual malice is not an element of an invasion of privacy action involving a private citizen. The state interest in compensating injury to private citizens was held to require application of a different rule from that of public figures. The *Gertz* case, supra, held:

> States should retain latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to

> the reputation of a private individual. . . and so long as they do not impose liability without fault the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. 94 S.Ct., at 3010.

The defendant also asserts that this court improperly charged the jury when it charged that a minor could not give his own consent to allege to (sic) invasion of his privacy. *Dixon v. U.S.*, 197 F. Supp. 798 (D.S.C. 1962) held that:

> In the absence of bad faith, the doctrine of waiver or consent does not apply to a minor, nor can he consent to the violation of his rights, and his rights cannot be waived by persons not authorized by law (to) do so. 197 F. Supp. at 803

This court designed its jury instruction on consent in accordance with the holding in *Dixon,* supra. Therefore, its instructions were proper. Although the recent holding in *T.Z. Standard v. Shine,* Opinion No. 21792 (S.C. Sup. Ct. Sept. 20, 1982) held that a minor may be found negligent if his behavior does not meet a standard to be expected of a child of like age, experience, and intelligence, the *Shine* case does not address the issue of consent. The doctrine of negligence is not at issue in this case.

Plaintiff Linda Hawkins' post trial motion for a new trial additur is denied. Plaintiff Linda Hawkins asserts that the jury found for her as to liability yet awarded neither actual damages nor nominal damages. The verdict form returned by the jury in this case read as follows:

> We find for the Plaintiff Linda Hawkins in the amount of 0 dollars actual damages and 0 dollars punitive damages.

At first glance, this appears to support the plaintiff's allegation, however, the verdict form provided to the jury failed to leave a space for the jury to find for the defendant in the case of Linda Hawkins by herself. Therefore, the jury's finding of no actual damages and no punitive damages was actually a finding for the defendant in this matter. The jury verdict in favor of the defendant in the case of plaintiff Linda Hawkins could have been based upon evidence in the record that her privacy was not invaded. Therefore, the plaintiff Linda Hawkins' motion for a new trial additur is denied.

WHEREFORE, all of the plaintiff's and the defendant's post trial motions in the above captioned case are denied and the verdict of the jury is upheld.

IT IS SO ORDERED.

/s/ Jonathan Z. McKown
Presiding Judge of the
7th Judicial Circuit

Dec. 11, 1983

Gaffney, SC

MOTION FILED
NOV 7 - 1986

(3)

No. 86-390

IN THE

Supreme Court of the United States

MULTIMEDIA, INC.,

Petitioner,

v.

CRAIG HAWKINS, by and through his Guardian ad Litem, Linda Hawkins,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CONUS COMMUNICATIONS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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November 7, 1986

1986—Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411—588-7506

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MOTION FOR LEAVE OF CONUS COMMUNICATIONS TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Conus Communications, by and through its counsel, respectfully moves the Court pursuant to Rule 36.1 of the Supreme Court Rules for leave to file an *amicus curiae* brief in support of the Petition for a Writ of Certiorari to the Supreme Court of the State of South Carolina.

Consent of the petitioner and respondent to file an amicus brief has been requested. The petitioner has given its written consent to Conus Communications; the respondent has not consented.

Conus Communications is a Minnesota limited partnership consisting of more than 45 member stations that use

their mobile uplink vans to transmit live reports and field edited features to their home stations and to other Conus stations. Conus Communications does not limit its activities to a single community or group of communities.

The question that Conus believes is of great importance is whether the media may be liable in the absence of fault for the truthful presentation of facts concerning a person, even facts which a reasonable person might wish to keep private and which are not "newsworthy." The implication of the decision of the South Carolina Supreme Court has a chilling effect on an organization such as Conus Communication which originates news reports outside of South Carolina (and other states which have recognized the particular type of invasion of privacy tort recognized in South Carolina) and which broadcasts/publishes the news report into a state like South Carolina which recognizes the tort. Under these circumstances, if the media can be liable without fault, and if the determination of what is "private" or "newsworthy" is to be done on a community by community basis, then organizations such as Conus Communications will have to refuse to report on stories that may be newsworthy in one community but not in another, or that may be offensive or objectionable in one community, and not in another even though true.

For the foregoing reasons, Conus Communications respectfully requests leave of the Court to file the attached amicus curiae brief in support of the Petition for a Writ of Certiorari to the South Carolina Supreme Court.

Dated: November 7, 1986

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IN THE

Supreme Court of the United States

MULTIMEDIA, INC.,

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v.

CRAIG HAWKINS, by and through his Guardian ad Litem, Linda Hawkins,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

AMICUS CURIAE BRIEF OF CONUS COMMUNICATIONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

STATEMENT OF INTEREST

The Amicus Curiae Conus Communications ("Conus") is a Minnesota limited partnership consisting of more than 45 member stations that use their mobile uplink vans to transmit live reports and field edited features to their home stations and to other Conus stations. Petitioner has consented in writing to Conus filing this *amicus* brief; the Respondent has refused to consent.

The question that Conus believes is of great importance is whether the *truthful* presentation of facts concerning a

person, even facts which a reasonable person might wish to keep private and which are not "newsworthy," may give rise to a common-law tort liability for damages on the theory of a public disclosure of a private fact (invasion of privacy) in the absence of some fault, such as the manner in which the facts were gathered or some ulterior motive in their publication. Petitioner could not adequately represent the issue with respect to a publication in many different communities. The implication of the decision of the South Carolina Supreme Court has a chilling effect on any organization originating a news report outside of South Carolina, (or any other state which has recognized the public disclosure of private facts form of invasion of privacy) and which broadcasts/publishes the report in a state like South Carolina that recognizes the public disclosure of private facts tort.

SUMMARY OF ARGUMENT

Before focusing on what this case does involve, it is important to note what this case does not involve. This case does not involve the form of invasion of privacy known as "false light." The Court has addressed the "false light" privacy tort on two earlier occasions: first, in *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) ("We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."); second, in *Cantrell v. Forest City Publishing Company*, 419 U.S. 245, 250-51 (1974) ("Consequently, this case presents no occasion to consider whether a State may constitutionally apply a more

relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory invasion of privacy, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases"). Both cases required a finding of fault, that the information put the plaintiff in a "false" light.

Nor does this case involve a question of potential criminal liability for publishing truthful information lawfully obtained like in *Smith v. Daily Mail Publishing Company*, 442 U.S. 97, 104 (1979) ("If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here.") The Court cautioned that *Smith* did not involve an issue of privacy or of unlawful press access to confidential judicial proceedings. *Id.* at 105.

Nor does this case involve a defamation about a private party as in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. —, 86 L.Ed.2d 593 (1985).

What this case does involve is the truthful presentation of a fact which a jury found a reasonable person would wish to keep private and was not itself "newsworthy." The scope of and limitation on the public disclosure of a private fact tort have never been addressed by the Court. As the Second Circuit Court of Appeals recently emphasized, "History suggests that individual rights of privacy are actionable when the media portrays an individual falsely, but not otherwise." *Machleder v. Diaz*, — F.2d —, 13 Med.L.Rptr. 1369, 1370 (2nd Cir. 1986). Nevertheless, some states and lower federal courts have imposed liability for truthful presentations of private non-newsworthy facts; other states and lower federal courts have denied recovery under such circumstances.

The two questions that Conus thinks are appropriate for the Court's consideration and which are important to the manner in which a free press gathers and disseminates news are (1) whether a fact has public concern or is newsworthy is a determination to be made as one of law for the Court or, instead, as one of fact for a jury; and (2) should a plaintiff be able to recover from a media defendant for the public disclosure of a private fact without showing some fault by the press. In other words, should the publication be a *per se* violation or should the plaintiff have to show some fault on behalf of the defendant.

I.

THE DECISION OF THE SOUTH CAROLINA SUPREME COURT CONFLICTS WITH THE PRINCIPLES ARTICULATED BY THE COURT AS TO WHETHER THE QUESTION OF "PUBLIC CONCERN" IS A QUESION OF LAW OR OF FACT

Although the Court has not directly addressed the question as to whether the Court or the jury should determine whether a "fact" is a matter of "public concern" in connection with a claim for invasion of privacy, the Court has determined in libel and other cases that it is for the Court both in the first and in the last instance to determine such an issue. In *Rosenblatt v. Baer,* 383 U.S. 75, 88 (1965), the Court held that "as is the case with questions of privileges generally, it is for the Trial Judge in the first instance to determine whether the proofs show respondent to be a 'public official.' " In *Bose Corp. v. Consumer's Union of United States, Inc.,* 466 U.S. 485, 511 (1984), the Court held that "The question whether the evidence in the record of a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not

merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice'." And finally, the Court in *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983), held that "the inquiry into the protected status of speech is one of law, not fact." Although the Court in *Connick* limited the distinction between public and private concern to the context of government employment (*Id.* at 148, n.8), that limitation does not affect whether the issue is one of fact or law.

The Supreme Court of South Carolina held, on the other hand, that "Ordinarily, however, whether a fact is a matter of public interest is a question of fact to be decided by the jury." Pet. App. 3a. As a result, the South Carolina Supreme Court rejected the analysis and holdings of this Court.

What is "newsworthy" or "private" will likely differ among communities, generations, ethnic, religious and other social groups, as well as among individuals. Editorial judgment as to what is "newsworthy" should not be submittable to review by a jury and, thereby, create "community by community standard." If this were the case, then facts which were broadcast nationally might be "newsworthy" in one community and "private" in another community. This would create a chilling effect on news gathering and news reporting.

In addition, the Court should not substitute its judgment for that of the press by requiring the press to present only the facts that the Court believes appropriate. Effective news reporting involves editing and the editing process necessarily involves professional judgments. What one person finds flattering, another might find obnoxious. Only when the

press so oversteps its editorial freedom should liability attach.

Even the concept of using a "public concern"/"private concern" test has been criticized by the Court. In *Gertz v. Welsh,* 418 U.S. 323, 346 (1974), the Court rejected the plurality approach from *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971), doubting the wisdom of committing the task of "conscience" even to a judge. The Court held instead, that it was inappropriate to apply a "general or public interest standard" to a private individual defamation case and opted to allow states to impose liability but only upon a showing of fault. When the "public concern" standard has been applied, there has been virtually no guidance as to what constitutes a protected matter of public concern. *Dun & Bradstreet v. Greenmoss Builders,* 86 L.Ed.2d at 620 (Brennan, J. dissenting).

As a result of the confusion as to whether "public concern" is a question of fact or of law, and whether the "public concern" should even be a test, the petition should be granted so that this Court can resolve the differences between state and lower federal courts and eliminate the uncertainty for all persons gathering and reporting news to both a local and national audience.

II.

THE "FAULTLESS" STANDARD ADOPTED BY THE SOUTH CAROLINA SUPREME COURT IS INCONSISTENT WITH CONSTITUTIONAL PROTECTIONS

The invasion of privacy tort recognized by the Supreme Court of South Carolina is a "faultless" tort. South Carolina has defined the tort as the "publicizing of one's private affairs with which the public has no legitimate concern"

and which is "of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence." *Meetze v. Associated Press,* 230 S.C. 330, 335, 338, 95 S.E.2d 606, 608, 610 (1956). As so defined, the tort necessarily has a head-on collision with First Amendment rights.

Other state supreme courts have required more than just publication and have imposed a fault standard in order to avoid the head-on collision with the First Amendment. For instance, in *Anderson v. Fisher Broadcasting, Inc.,* 300 Ore. 452, 715 P.2d 803 (1986), the Oregon Supreme Court noted that the common law tort based solely on publicizing private facts that are true but not newsworthy has met critical response and that the tort was neither part of the common law of England and, after study, was specifically rejected in England. The Oregon Supreme Court concluded that there could be no liability for the truthful presentation of facts that a reasonable person would wish to keep private and that are not "newsworthy" without a showing that the manner or purpose of defendant's conduct was wrongful in some respect apart from causing the plaintiff's hurt feelings. The Oregon Supreme Court also analyzed the purpose of the tort and emphasized that it singled out the print, film and broadcast media for conduct that would not be applied to gossip-mongers in neighborhood taverns.

A national news gathering and disseminating service can afford to perform its job with maximum impact only by complying with the most restrictive standard in any of the jurisdictions to which its news reports may be carried. If liability can attach for the truthful reporting of "private" facts without the requirement of some fault, or without some

showing that the press substantially overstepped its editorial freedom, national news gathering and disseminating services cannot perform the function of the free press envisioned by the First Amendment drafters. Adopting a standard of "clear and convincing proof" of actual malice would accomplish the delicate balancing which needs to be made between the individual's right of privacy and the freedom of the press. Accordingly, this Court should grant the writ of certiorari to resolve the substantial dispute between state courts and lower federal courts.

CONCLUSION

This case involves a struggle between private rights and freedom of the press guaranteed by the First Amendment. The resolution of the struggle should not be made on a community by community basis; there should be a uniform standard applicable everywhere. For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari to the Supreme Court of the State of South Carolina.

Dated: November 7, 1986

Respectfully submitted,

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NOV 10 1986

No. 86-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULTIMEDIA, INC.,

Petitioner,

v.

CRAIG HAWKINS, by and through his Guardian ad Litem LINDA HAWKINS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of South Carolina

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PRINT AND BROADCAST MEDIA AND ORGANIZATIONS † IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-390

MULTIMEDIA, INC.,

Petitioner,

v.

CRAIG HAWKINS, by and through his Guardian ad Litem LINDA HAWKINS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of South Carolina

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The North Carolina Press Association, the News and Observer Publishing Company, Inc., The Knight Publishing Company and all other entities listed as *amici curiae* in the accompanying proposed brief hereby move the Court, pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, for leave to file the proposed brief *amicus curiae* in support of the Petition for a Writ of Certiorari to the Supreme Court of the State of South Carolina in this case.

The grounds for this motion are that *amici*, each of whom is a publishing or broadcasting entity having a

direct and immediate concern for and interest in First Amendment limitations on suits for invasion of privacy, desire to file the attached proposed brief and have obtained written consent from the Petitioner, Multimedia, Inc. Through counsel, *amici* also have requested written consent on the part of the Respondent, but such consent was not granted. Because of the nature and significance of this case for journalists and broadcasters everywhere, and particularly for those whose articles and broadcasts are distributed across state lines and/or within the State of South Carolina, *amici* respectfully submit that the points raised in the accompanying proposed brief would be helpful to the Court's consideration of the Petition for Writ of Certiorari.

For the foregoing reasons, *amici* respectfully request that this Motion for Leave To File Brief Amicus Curiae be granted.

Respectfully submitted,

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November 10, 1986

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-390

MULTIMEDIA, INC.,

Petitioner,

v.

CRAIG HAWKINS, by and through his Guardian ad Litem LINDA HAWKINS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of South Carolina

---

BRIEF AMICUS CURIAE OF PRINT AND BROADCAST MEDIA AND ORGANIZATIONS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

INTEREST OF AMICI

This case presents the anomalous and alarming spectre of a newspaper having been punished financially by a South Carolina jury for publishing concededly truthful facts in connection with its efforts to inform its readers about the social and personal consequences of teen-age pregnancy. The *amici curiae* submitting this brief include a wide array of entities representing all forms of the news media—newspapers, radio, and television. Many of them—such as the Associated Press, the Knight Publishing Company, the National Association of Broadcasters, and The News and Observer Publishing Company—represent editors and news directors who on every work-

ing day are responsible for making thousands of decisions about what information to distribute to the citizens of South Carolina, twelve of whom sat as *ex post facto* censors in this case. All of them represent news men and women whose stories and broadcasts are distributed widely and who need this Court's considered guidance concerning the limitations imposed by the First Amendment on the tort of invasion of privacy, especially with regard to the form commonly referred to as "publication of embarrassing private facts."

Since the publication in 1890 of Samuel Warren's and Louis Brandeis' enormously influential *Harvard Law Review* article entitled "The Right of Privacy," this tort has spread gradually and steadily from jurisdiction to jurisdiction, largely unencumbered by constitutional restraints. Because the reach of the First Amendment's protection with regard to the publication of truthful, private facts has not been spelled out, journalists must make their editorial judgments about private facts in the dark. Accordingly, the *amici* listed below have strong, direct interests in the Court's granting the Petition for Writ of Certiorari and using this case as an opportunity to illumine their constitutional path.

STATEMENT OF THE CASE

We adopt the Statement of the Case set forth by petitioner in its petition.

SUMMARY OF ARGUMENT

Petitioner has set out concisely the compelling grounds on which it seeks to have a writ of certiorari issue to review the judgment in this case. The *amici* support that petition on the grounds raised therein and respectfully emphasize to the Court two points. First, the decision below appears to conflict with this Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983), in which the

Court found the determination whether speech is "of public concern" to be a question of law, not one of fact. Second, the decision below, in any event, raises important First Amendment issues that affect all those who utter truthful speech, from national or regional news organizations disseminating information in many states to individuals discussing their neighbors over the backyard fence.

If the decision in this case is allowed to stand without clarification, there is little doubt that publishers will be deterred from disseminating truthful information that is of legitimate public concern. If a jury may award a plaintiff actual and punitive damages in a virtually arbitrary amount from a publisher who has accurately included plaintiff's name in an article on a topic of undisputed public concern, the flow of important information to the public will be curtailed. In an effort to avoid the incalculable risk of capricious jury verdicts, future publications shall "steer far wider of the unlawful zone," and omit truthful information of names, locations and personalities, those indicia of credibility and humanity that undeniably contribute to the quality of debate about issues of public concern.

Moreover, the interstate dissemination of news in our society demands a constitutional standard regarding the imposition of liability for publishing truthful information. Publishers such as the news wire services, the national television networks, and regionally and nationally distributed newspapers, among others, will otherwise be forced to predict, and to homogenize their news coverage to meet, the standards acceptable to the most intolerant jury in the most conservative jurisdiction.

This Court has on several occasions discussed the relatively youthful tort of invasion of privacy by the publication of truthful intimate facts. *E.g., Cox Broadcasting v. Cohn*, 420 U.S. 469, 487-90 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967). This Court, however, has

to date declined to decide whether one may, consistent with the First Amendment, "be made criminally or civilly liable for publishing information that is neither false nor misleading but absolutely accurate, however damaging it may be in reputation or individual sensibilities." *Cox, supra*, at 489. This Court has often noted that truth may not be the subject of either civil or criminal sanctions where discussion of public concern is at issue. *E.g., Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *Philadelphia Newspapers, Inc. v. Heppes*, —— U.S. ——, 106 S.Ct. 1558, 1559 (1986); *cf. Smith v. Daily Mail Publishing Company*, 443 U.S. 97, 103 (1979) (". . . if a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.")

Because the tort of invasion of privacy by publication of truthful intimate facts, like the tort of libel, possesses an inherent capacity for "repression of expression," *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), it necessarily implicates First Amendment values and concerns. Labeling a particular form of speech as an "invasion of privacy" does not cloak it with a "talismanic immunity from constitutional limitations." *Cf. New York Times, supra*, at 269.

This case presents the Court with significant First Amendment issues ripe for determination. First, does some degree of First Amendment protection attach to all truthful speech? Second, what degree of First Amendment protection should be afforded publication of truthful information in order to provide some "breathing space" and assure that publishers are not unnecessarily deterred from disseminating truthful information that is of legitimate public interest or concern? *Cf. Connick, supra*. Third, should the Court, as an element of that First Amendment protection, conduct an independent ex-

amination of the entire record in an invasion of privacy case "to ensure that protected expression will not be inhibited"? *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 104 S.Ct. 1949, 1962, *reh. denied* (1984).

ARGUMENT

I. The Decision Below Conflicts with a Prior Decision of This Court.

In *Connick*, *supra*, a federal employee brought an action contending that her employment had been wrongfully terminated because she had exercised her constitutionally protected right of free speech. The Court, noting that in such cases First Amendment protections attach to "speech on matters of public concern," focused on the proper determination of that issue. The Court first stated that "the question of whether expression is of a kind that is of legitimate concern to the public is also the standard in determining whether a common law action for invasion of privacy is present." *Id.* at 143 n.5. The Court observed that whether the speech "addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 148. That determination, the Court held, is one of law for the court. *Id.* at 148 n.7. That standard has been applied by the lower federal courts. *E.g.*, *Jurgensen v. Fairfax County*, 745 F.2d 868, 878 (4th Cir. 1984); *Knapp v. Whitaker*, 757 F.2d 827, 839 (7th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 36 (1985); *Thomas v. Harris County*, 784 F.2d 648, 653 n.11 (5th Cir. 1986).

Petitioner notes in its petition that there is "a direct conflict among the state and federal courts on the issue whether the question of public interest is for the judge to decide in the first instance or for the jury alone." (Petition, at 7) The South Carolina Supreme Court's decision in this case that this issue is one for the jury

alone is in direct conflict with this Court's decision in *Connick*.

II. First Amendment Interests Are at Stake.

The tort of invasion of privacy by the publication of truthful intimate facts is a relatively recent, uniquely American invention.[1] It was first conceptualized in 1890 by Samuel Warren and Louis Brandeis in their celebrated article "The Right to Privacy," 4 Harv. L. Rev. 193. By 1975 it had been recognized judicially or by statute in at least 34 states. *Cox, supra,* at 488. In South Carolina, it is defined as the "publicizing of one's private affairs with which the public has no legitimate concern" and which is "of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence." *Meetze v. Associated Press,* 230 S.C. 330, 335, 338, 95 S.E.2d 606, 608, 610 (1956). The elements of the tort in South Carolina are essentially the same as in other states that have recognized the cause of action. *See,* Restatement (Second) of Torts, Section 652D (1977).

It is self-evident that this tort, first conceived in 1890, was unknown to and uncontemplated by the framers of the First Amendment. This Court has discussed the tort but never addressed the issue of whether it implicates First Amendment concerns. *Cox, supra,* at 487-90; *Time, supra,* at 383 n.7.

This Court has frequently suggested that truthful speech is subject to a high, if not absolute, degree of First Amendment protection.[2] *Garrison, supra,* at 74;

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[1] The tort has been rejected or gone unrecognized in other common law jurisdictions. R. Smolla, *Suing The Press,* at 123 (1986).

[2] The irony inherent in an intimate facts invasion of privacy case is self-evident. Where "false speech" defamation is at issue, the speaker—whether a national newspaper or a smalltown gadfly—has had the opportunity prior to publication to establish the ultimate

Smith, supra, at 103; *Philadelphia Newspapers, supra,* at 1559 (The First Amendment "does require the target of a defamatory statement to prove that his assailant was at fault, and I agree that it provides a constitutional shield for truthful statements." *Id.* at 1566, Stevens, J., dissenting, joined by Burger, J., White, J., and Rehnquist, J.) The *amici* submit that First Amendment interests are implicated by this tort and that these important First Amendment concerns should be addressed by this Court.

Although this Court's discussions have provided virtually no definition of the First Amendment interests implicated by this modern tort, the history of libel cases decided by this Court provides some guidelines as to the types of concerns involved. In *New York Times v. Sullivan, supra,* and its progeny, the Court has held that even false speech about public officials or public affairs is entitled to First Amendment protection. The reasoning is simple: ". . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72. The Court stated

> a rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—

"defense" of truth which may be proved by objective facts. In an intimate facts invasion of privacy case, the speaker has no way to determine prior to publication whether a jury may later decide—on what is of necessity a subjective basis—that the subect matter was not "of public concern." Moreover, *New York Times* and its progeny provide protection of various degrees for some *false* speech of public concern, but appear to have substantially reduced or removed those protections for false speech where the subject matter is not "of public concern." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* —— U.S. ——, 105 S.Ct. 2939, 2955 (1985); *Philadelphia Newspapers, Inc., supra,* at 1559. If the speaker simply guesses wrong on the "of public concern" issue, he could, after *Dun & Bradstreet,* succeed with what may be his only remaining "defense" in a libel suit—that of truth—only to find it a hollow victory if the second claim against him is for invasion of privacy.

> and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' (cites omitted) The rule thus dampens the vigor and limits the variety of public debate.

Id. at 279.

Justice Brennan, in his dissent in *Dun & Bradstreet, Inc., supra*, summarized this analysis as follows:

> Cases since *New York Times v. Sullivan* have proceeded from the general premise that all libel law implicates First Amendment values to the extent it deters true speech that would otherwise be protected by the First Amendment.

Id. at 2955.

Similarly, even if truthful speech may, in rare circumstances, be constitutionally punishable because of privacy concerns, First Amendment values are nonetheless implicated because such sanctions will necessarily deter other truthful speech of legitimate public concern that would otherwise be protected by the First Amendment.

The concept of punishing truthful speech is itself a startling one in a nation founded on principles of individual autonomy and freedom of speech. Against the background of that rich historical tapestry of free expression, it is sobering to contemplate the chilling effect that punishment of truthful speech may have. In a society as diverse as our own, what newspaper editor op-

erating on deadline can accurately predict whether a jury may later decide that a particular truthful comment or photograph is not "of public concern"? What national network news editor splicing tape for a daily 6:30 p.m. news broadcast can accurately predict whether a jury in South Carolina or California may later decide that its accurate visual images of victims of war, natural disaster, disease or domestic violence are not "of public concern"? What individual can accurately predict whether a jury may later decide that his or her truthful comment to a third party that a neighbor has an infectious disease or an illegitimate child is not "of public concern"? Can we safely leave to the sole discretion of juries the role of setting the outer limits, on a case-by-case basis, of what truthful speech about the fabric of our daily lives is permissible? [3] As this Court has stated:

> It is no doubt true that a central purpose of the First Amendment " 'was to protect the free discussion of governmental affairs.' " (cites omitted). But our cases have never suggested that expression about philosophical, social, artistic, economic, literary or ethical matters . . . is not entitled to full First Amendment protection.

Abood v. Detroit Bd. of Education, 431 U.S. 209, 231-232 (1977).

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[3] " 'Newsworthy' facts include not just descriptions of events and information related to politics, economics, and social policy, but also facts that show how people live and work and think. Entertaining vignettes, interesting profiles of ordinary as well as extraordinary people, and true life pictures of spectators and passersby as well as of those at the center of a main event, all are 'newsworthy.' " B. Dill, *The Journalist's Handbook on Libel and Privacy*, at 136 (1986). *See also*, Restatement (Second) of Torts § 652D, Comment j (1977): "The scope of a matter of legitimate concern to the public . . . extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment . . . ."

If publishers are to be punished, with no deference given to First Amendment concerns, for including in news articles about matters of undisputed public concern the names and faces of the individuals on whom events of the day have personal impact, the news pages and television screens in this country will cease to be mirrors of society and its complexities. They will instead become dry recitations of impersonal statistics to be ignored by the public. Without the context of personalities and details, the news coverage of important events and issues will be diminished in its humanity and in its credibility.

Because of the important First Amendment interests here at stake, *amici* respectfully urge the Court to provide some illumination and guidance on the important issues raised by this case.

III. The Court Should Determine the Degree of First Amendment Protection Required.

Petitioner has focused on several elements of the constitutional protection that should be afforded publication of truthful information. As a starting point, First Amendment interests require that a plaintiff in an intimate facts invasion of privacy case bear the burden of proving the absence of public interest in the publication, as opposed to the defendant bearing the burden of proof that the publication was of public interest. Second, First Amendment interests require that plaintiff demonstrate some variation of "constitutional malice" as defined in *New York Times, supra.* Third, First Amendment interests require that both of those elements be proved by "clear and convincing evidence." Fourth, and perhaps most important, First Amendment interests require that the determination of the issue of "public interest" be not a question of fact to be determined solely by the jury. The First Amendment instead requires the trial court to make at least a threshold determination whether the pub-

lication may be construed as being not "of public interest."

A. True Speech Should Be Presumptively Protected and the Burden of Proof Should Lie With Plaintiff.

This Court held in *Philadelphia Newspapers*, *supra*, that "at least where a newspaper publishes speech of public concern," a private figure plaintiff in a libel suit must bear the burden of showing that the speech at issue is false before recovering damages from a media defendant. In an intimate facts invasion of privacy suit, the very question of whether the speech is "of public concern" is the crucial issue. The logic of *Philadelphia Newspapers* suggests that where state law requires a defendant, in order to avoid liability, to prove that speech *is* "of public concern," some truthful speech of legitimate public concern will be deterred "because of the fear that liability will unjustifiably result." *Id.* at 1564. In accordance with *Philadelphia Newspapers*, minimal First Amendment protection requires that the burden of proof on that issue should lie with the plaintiff.

The *amici* submit, moreover, that actual true speech is entitled to protection greater than that afforded the "false" speech protected by the constitutional aspects of libel law to assure "breathing space" for true speech. True speech should at least be entitled to a presumption that it is absolutely protected as speech "of public concern." Certainly this society can tolerate—and should, indeed, sufficiently welcome—the exchange of truthful information to protect it with the presumption that the communication of accurate information is in the public interest. As petitioner has urged, that presumption should yield, if ever, only to clear and convincing evidence that the speech is not "of public concern."

B. The "Of Public Concern" Issue Is One Of Law for the Court.

Perhaps the most important issue raised by petitioner involves the determination of the ultimate issue in such

a case: Is the issue of whether a publication is "of public concern" one of pure fact to be determined solely by the jury?

In two of its recent decisions, this Court has suggested that speech that is not "of public concern" should receive a diminished degree of First Amendment protection. *Dun & Bradstreet, Inc., supra; Philadelphia Newspapers, supra,* at 1567 ("When the issue is of exclusively private concern and the plaintiff is a private figure . . . the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.")

Although the question of whether the allegedly false publications in *Dun & Bradstreet, Inc., supra,* and in *Philadelphia Newspapers, supra,* were "of public concern" was crucial to those cases, the Court barely addressed the issue of how such determinations should be made. As Justice Brennan stated in his dissent in *Dun & Bradstreet* (joined by Justices Marshall, Blackmun and Stevens), the five members of the court who voted to affirm the plaintiff's award "provided almost no guidance as to what constitutes a protected 'matter of public concern.'" *Dun & Bradstreet, supra,* at 2959-2960. Even less guidance is offered in *Philadelphia Newspapers.* Because that issue has become one of substantial significance in both libel and truthful intimate facts cases, one which transforms constitutionally protected speech into readily punishable speech, it is an issue which must in the first instance be determined by the trial court. To leave such a subjective issue solely to the jury is to assure that important truthful speech of all kinds shall go forever unuttered.

As Justice Douglas noted in his concurring opinion in *Time, supra*:

> A trial is a chancy thing, no matter what safeguards are provided. To let a jury on this record

> return a verdict or not as it chooses is to let First Amendment rights ride on capricious or whimsical circumstances, for emotions and prejudices often do carry the day.

Id. at 402.

This Court, in applying First Amendment standards in a recent "free speech" case, held that the issue "of public concern" is one of law for the court to decide. *Connick, supra.* It is true that this Court, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) in rejecting the constitutional standards applicable to false and defamatory speech originally established in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), specifically expressed concern over the "great difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not . . . ." *Gertz, supra*, at 346. However difficult that task may be for judges who may properly compare the content, form and context of a publication with the body of law developed by other courts, it is an impractical and dangerous task to delegate to juries who may not properly make such comparisons and who are more likely to be swayed by passion or prejudice.

IV. The First Amendment Requires Independent Review of the Entire Record.

Assuming *arguendo* that the publication of truthful but intimate facts which are of no public concern can, under rare circumstances, be punished consistent with the First Amendment, the determination of whether such a publication is "of public concern" is a dispositive constitutional issue regarding which this Court should conduct an independent review. Various forms of speech have been found to be unprotected by the First Amendment, including fighting words, incitement to riot, obscenity and child pornography. This Court has nonetheless found that the First Amendment concerns such cases

present require careful appellate scrutiny. In upholding independent review of the record in such cases by appellate courts, this Court has stated:

> In each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance. *In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.* Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger the decisions by triers of fact may inhibit the expression of protected ideas. The principle of viewpoint neutrality that underlies the First Amendment itself (citations omitted) also imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected.

Bose, supra, at 1962.

The facts of this case cry out for an independent review of the record. The petitioner published, in one of its newspapers, an article concerning medical and social problems resulting from pregnancies among unwed teenage mothers. In a related "side-bar" article, the newspaper focused on a local case history of an unwed teenage mother in which it identified the respondent as the father of the illegitimate child. The truthfulness and accuracy of the published facts were never disputed. Nor did respondent dispute that the general subject of pregnancies among unwed teenage mothers was a matter of important public concern. (Petition at 2-3)

Truthful speech should command the strongest of First Amendment protections. Just as this Court has provided "independent review" in cases involving other forms of allegedly unprotected speech, such as child pornography, *New York v. Ferber*, 458 U.S. 747 (1982) and obscenity, *Roth v. United States*, 354 U.S. 476 (1957), it should provide independent review in this case involving an award of damages arising from the publication of truthful information related to a subject of undisputed public concern.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the petition for writ of certiorari to the Supreme Court of the State of South Carolina be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

DESCRIPTION OF AMICI

1. *Associated Press*—The Associated Press, the world's largest newsgathering organization, is a mutual news cooperative organized under the Not-For-Profit Corporation Law of the State of New York, and engages in gathering and distributing news of local, national and international importance to its member newspaper and broadcast stations across the United States and throughout the world. The AP, on its own behalf and on behalf of its members, has a vital interest in protecting the right of the press to gather and publish news without fear of sanctions for accurately reporting matters of public interest.

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2. *The Knight Publishing Company*—The Knight Publishing Company, a Delaware corporation, publishes *The Charlotte Observer*, a daily newspaper with a circulation of approximately 208,000 on weekdays and 259,000 on Sundays. Approximately 24,000 copies of *The Charlotte Observer* are distributed in South Carolina each weekday, and approximately 31,000 copies are sold in South Carolina on Sundays. Because of the persuasive authority of this decision by the highest court of the State of South Carolina, and because of the effect of this decision as precedent in a state in which The Knight Publishing Company circulates a daily newspaper, The Knight Publishing Company has a vital interest in obtaining Su-

preme Court review of this case and in reversing the decision below.

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3. *Midwest Communications, Inc.*—Midwest Communications, Inc. is a Minnesota corporation which owns and operates five radio and television stations in Minnesota, Wisconsin, and Michigan, including WCCO-AM-TV in Minneapolis, Minnesota.

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4. *National Association of Broadcasters*—The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated association of radio and television broadcast stations and networks. NAB membership include more than 4800 radio stations, 900 television stations, and the major commercial broadcast networks. Among NAB's priorities is the protection and enhancement of broadcasters' First Amendment rights, including the freedom to report and comment on news events. Among NAB's members are more than 100 radio and television stations located in South Carolina.

Henry L. Baumann
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National Association of Broadcasters
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5. *The News and Observer Publishing Company*—The News and Observer Publishing Company is a North Carolina corporation whose principal place of business is located in Raleigh, Wake County, North Carolina. The company publishes *The News & Observer*, *The Raleigh Times*, and 18 other newspapers throughout North Carolina and South Carolina. The newspapers published by the company in South Carolina include *The Herald*, published daily in Rock Hill, South Carolina; *The Beaufort Gazette*, Beaufort, South Carolina; and *The Island Packet*, published in Hilton Head, South Carolina.

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Observer Publishing Company

6. *North Carolina Press Association, Inc.*—The North Carolina Press Association, Inc. (the "NCPA") is a voluntary membership association chartered as a non-profit corporation under the laws of North Carolina. Its principal place of business is located at Suite 1100, 5 West Hargett Street, Raleigh, North Carolina 27602. Its membership consists of approximately 55 daily newspapers and 120 non-daily newspapers published throughout North Carolina. A number of the NCPA's member newspapers circulate in South Carolina and therefore are directly affected by the decision below.

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Association, Inc.

7. *The Reporters Committee for Freedom of the Press* —The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment interests of the press. It has provided representation, information, legal guidance or research in virtually every major press freedoms case litigated since 1970.

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Suite 300
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8. *Scrips Howard*—Scripps Howard, one of the nation's largest communications companies, is engaged in virtually every aspect of news and information gathering and dissemination. One American in nine is a Scripps Howard reader, viewer, or listener. Scripps Howard publishes daily newspapers in fourteen cities as well as a variety of non-daily newspapers, magazines, and business journals, and owns and operates radio and television stations, cable systems, Scripps Howard News Service, and United Media Enterprises, a multi-media service company.

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9. *The Society of Professional Journalists, Sigma Delta Chi*—The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, non-profit organization of 24,000 members representing every branch and rank of print and broadcast journalism. Formed in 1909, it is the largest organization of journalists in the United States.

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